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Supreme Court, U.S.
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No. 91-

In The
Supreme Court of the United States
October Term, 1991

TONY AVIRGAN, and MARTHA HONEY,

Petitioners,

v.

JOHN HULL, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal court impose a sanction of more than $1 million against non-lawyer clients because they were "willful participants" in a lawsuit that their attorneys were found to have litigated in bad faith and because they "must have known prior to suing that there was no competent evidence to substantiate" their claims, even though there was no evidence that the clients had such knowledge or that they were capable of making judgments about the admissibility of evidence?

PARTIES TO THE PROCEEDING

Petitioners Tony Avirgan and Martha Honey were plaintiffs in the district court and appellants in the court of appeals. They were represented in the district court by respondent Daniel P. Sheehan, who is filing a separate petition, and his employer, the respondent Christic Institute, a public interest law firm which is also filing a separate petition. Both Sheehan and the Christic Institute were non-party appellants in the court of appeals. The remaining respondents John Hull, Bruce Jones, Rene Corbo, Felipe Vidal, Moises Dagoberto Nunez, Francisco Chanes, Ramon Cecilio Palacio, Ricardo Gris, William Gris, Roger Lee Pallais, Amac Galil, Hector Cornillot, Jorge Gonzalez, Adolfo Calero, Alvaro Cruz, Frederico Saenz, Robert Owen, John Singlaub, Ronald Joseph Martin, Sr., James McCoy, Tom Posey, Rafael "Chi" Quintero, Mario Delamico, Tom Clines, Ted Shackley, Albert Hakim, Richard Secord, Pablo Escobar, and Jorge Ochoa were all defendants in the district court. Some were never served or for other reasons were not appellees in the court of appeals.

In addition to the parties, the following individuals and entities filed briefs *amicus curiae* supporting the appellants in the court of appeals: Church of the Brethren, Church Women United, Conference of Major Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious, the Maryknoll Fathers and Brothers, General Conference Mennonite Church, National Council of Churches of Christ in the U.S.A. Unitarian Universalist Association, the Womens Division of the United Methodist Board of Global Ministries, Professor Melissa Nelken, Professor Carl Tobias, and Professor Mary Twitchell, Trial Lawyers for Public Justice, Public Citizen, and Alliance for Justice. Counsel for petitioners Avirgan and Honey were not counsel for petitioners below, but were counsel on the *amicus* brief submitted by Public Citizen and the Alliance for Justice.

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Tony Avirgan and Martha Honey hereby petition this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming a sanctions award against them of more than $1 million.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit appears in petitioners' appendix ("Pet. App.") at 1a-23a and is reported at 932 F.2d 1572. The order denying rehearing and rehearing *en banc* is not reported and appears in Pet. App. 46a-47a. The February 2, 1989 Order of the United States District Court for the Southern District of Florida awarding sanctions and attorneys' fees, together with its Order of February 24, 1989, clarifying that Order, are reported at 705 F. Supp. 1544 and 125 F.R.D. 189, and appear in Pet. App. 24a-41a and 42a-45a, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. On August 7, 1991, Justice Kennedy signed an order extending the time to file a petition for a writ of certiorari to and including October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

There are no statutes, rules, or constitutional provisions directly at issue in this petition because the district court specifically found that Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 were inapplicable to these petitioners, although they were applied to their attorneys. The validity of the sanctions award against these petitioners turns on the judicially created "bad-faith" exception to the American Rule, which generally prohibits shifting of attorneys' fees to the losing party.

STATEMENT OF THE CASE

A. *Background*

Most of the facts in this case relevant to the responsibility of the respondents for the actions alleged in the complaint were in sharp dispute. However, there are a core of facts relevant to the sanctions award on which there is agreement and on which the propriety of the sanction of in excess of $1 million against the petitioners Tony Avirgan and his wife Martha Honey turns. That sanction was imposed jointly and severally against them and Daniel Sheehan, the lead counsel on the merits of this case ("Sheehan") and his public interest law firm and employer, the Christic Institute ("Christic"), who are filing separate petitions in this Court. As used herein, the term plaintiffs shall mean only petitioners Avirgan and Honey; the term petitioners shall include plaintiffs, Sheehan, and Christic. The term respondents shall mean the defendants in the trial court who were appellees in the court of appeals.

On May 30, 1984, plaintiff Avirgan, a professional journalist,

was attending a press conference as a representative of ABC News held by Eden Pastora just across the Costa Rican border in La Penca, Nicaragua. In an apparent attempt to kill Pastora and the journalists present, a bomb was detonated at the conference, severely injuring a number of supporters of Pastora and journalists, including plaintiff Avirgan, who also had all of his equipment destroyed. As a result of his injuries, Avirgan was hospitalized in Costa Rica and Philadelphia, sustained major medical costs, and lost considerable time from his work. His wife, plaintiff Honey, who was not with him at the time, was also required to devote considerable time away from her job as a journalist to take care of him.

Both because of his journalistic interest in the activities in Central America and the injuries he sustained in the bombing at La Penca, plaintiff Avirgan, joined by his wife, embarked on a major investigation into the incident at the request of several independent press organizations. They eventually published a report entitled "La Penca: Report of an Investigation," which connected a number of the respondents with the events leading to the La Penca bombing. Following publication of that report, the respondent John Hull sued plaintiffs for criminal libel in Costa Rica, and at a trial held in early May 1986 they were acquitted of the charge, and that ruling was affirmed on appeal.

Meanwhile, an investigation into these and other related events was being undertaken by Christic and Sheehan. Eventually, plaintiffs Avirgan and Honey met with Sheehan, and they agreed to file a lawsuit in which Christic and Sheehan would represent plaintiffs on a pro bono basis in an effort to recover their damages and to enjoin the conspiracy which they believed had caused these and other injuries. It was agreed that the allegations of the lawsuit would be based on both the investigations undertaken by plaintiffs and those undertaken by Sheehan and Christic. Since plaintiffs are not attorneys, the details of the complaint and the litigation were left to Sheehan and Christic.

B. *Proceedings in the District Court*

The complaint was filed on May 29, 1986, in the United

States District Court for the Southern District of Florida with jurisdiction based on 18 U.S.C. § 1964, commonly known as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and 28 U.S.C. § 1331. Named as defendants were John Hull and a number of others who were identified in plaintiffs' La Penca report, as well as others whose participation in the conspiracy alleged in the complaint was determined through the separate investigation undertaken by Christic. The plaintiffs, who resided in Costa Rica at all relevant times, did not sign either the original or any of the amended complaints, nor did they execute any affidavits. They did sign affirmations as to the answers to several sets of interrogatories, and they were eventually deposed at great length, with their testimony covering more than 800 pages between them.

Instead of answering the complaint, defendants filed a motion to dismiss, which included a claim that the RICO complaint could not be filed without a showing of probable cause. Although denying the need to establish probable cause, Sheehan filed an affidavit detailing at great length the investigations undertaken in order to support the complaint. The court denied the motion to dismiss. Because it concluded that there was no probable cause requirement, there was no necessity for passing on the sufficiency of the Sheehan affidavit. Discovery then proceeded with little or no involvement of the plaintiffs, other than that noted above.

Eventually, respondents moved for summary judgment, and the district court granted the motion on the purely legal ground that there was no "admissible" evidence that showed a causal connection between the conspiracy alleged in the complaint and the injuries to the plaintiffs because all of plaintiffs' evidence on this issue was "inadmissable hearsay." *Avirgan v. Hull*, 691 F.Supp. 1357, 1375-76 (S.D. Fla. 1988). Sheehan and Christic then filed a notice of appeal on behalf of the plaintiffs and represented them on the appeal, in which they contended that the motion for summary judgment had been improperly granted.

Meanwhile, most of the respondents moved in the district court for sanctions, in the form of attorneys' fees and costs, against

plaintiffs, Sheehan, and Christic, jointly and severally. The motions relied on Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and the "bad-faith" exception to the American Rule. Despite the different legal theories on which each might be held liable, Sheehan and Christic filed a single opposition on behalf of themselves and the plaintiffs. On February 2, 1989, the district court granted the motions with respect to virtually all of the attorneys' fees and costs sought. The award exceeded $1 million and was imposed jointly and severally against the plaintiffs, Sheehan, and Christic.

To support this ruling, the district court's brief discussion asserted that, after "two years of protracted and extensive discovery," plaintiffs were "unable to produce a single witness who could state the defendants exploded the bomb or were responsible for the assassination attempt" and, therefore, that the attorneys for the plaintiffs "must have known prior to suing that they had no competent evidence to support" the claim. Pet. App. 24a. The court then referred to the Sheehan affidavit which it characterized as the basis on which "plaintiffs were permitted to conduct two years of discovery." *Id.* at 25a. It then stated that many of the allegations "were based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." *Id.* at 26a. Accordingly, it concluded, quoting from the Eleventh Circuit opinion in *Collins v. Walden*, 834 F.2d 961, 964 (1987), that "plaintiffs 'had every reason to know they stood no chance of proving' that the defendants were responsible for the injuries to Tony Avirgan." *Id.* Equating this inability to prove their case with an "abuse of the judicial process," the court held that "the plaintiffs" were required to "make the defendants whole by paying the fees the defendants have been forced to expend for attorneys in this action." *Id.* Finally, in the course of its much lengthier discussion of the amount of fees and costs, the court noted that the award was made "coextensively pursuant to the 'bad faith' exception to the American Rule, *see Alyeska Pipeline Service Co.*, 421 U.S. 240 (1970), 28 U.S.C. § 1927 (1986), and Fed. R. Civ. P. 11." Pet. App. 35a n.5.

Although respondents had prevailed on the motion, they nonetheless asked the court to explain who was responsible for

what costs and fees. Thereafter, on February 24, 1989, the court issued a three-and-a-half page "Order Clarifying Order Dated February 2, 1989," which stated that "liability for the costs and fees must rest jointly and severally with Daniel Sheehan, Esq., The Christic Institute, and the plaintiffs Tony Avirgan and Martha Honey." Pet. App. 43a. The court then attempted to explain the use of its term "coextensively," suggesting that it "indicates that each of the authorities, separate unto itself, support the entire award. Of course different legal standards govern the award under each authority." *Id.* The court found that Sheehan was liable as lead counsel and because he formulated "the litigation strategy and tactics that justified the entire award under the bad faith exception and 28 U.S.C. § 1927." *Id.* The court further observed that he "also signed the complaint and affidavit upon which the court justified the entire award under Fed. R. Civ. P. 11." *Id.* The court also based the sanction on Sheehan's neglect of "his continuing obligation under all three authorities to assure that the allegations in the complaint and the affidavit were borne out in the discovery process." *Id.*

The district court next found Christic liable as the "self-pronounced law firm representing the plaintiffs" whose "attorneys carried out Mr. Sheehan's litigation strategy, and willingly participated in the litigation tactics." Pet. App. 44a. It noted that Christic's name appeared on "all or most of the plaintiffs' filings" and that "it acted through its officers, the attorneys representing the plaintiffs," which made it liable because of "its agents' neglect of their continuing duty under all three authorities to avoid this frivolous lawsuit." *Id.*

Finally, it turned to the award against the plaintiffs, which it sustained "[f]or like reasons." *Id.* First, it asserted that the plaintiffs cannot be liable under Rule 11 or section 1927 because they are not attorneys, but found them liable because they were "willful participants in Mr. Sheehan's litigation strategy." *Id.* It further noted that the Institute paid them "approximately $50,000 for consultation, public speaking, and trips from Costa Rica to the United States," *id.*, although failing to note that much of that money was reimbursement for out-of-pocket expenses, principally for travel, or that the compensation was principally for

investigative work which was admittedly done. The court did not explain either its theory of "willful participation" or the relevance of the reimbursements and other payments, nor make any other findings or cite any other evidence; it simply concluded that the plaintiffs were liable for the entire award under the bad-faith exception. *Id.*

C. *The Opinion of the Court of Appeals*

Appeals from the sanctions orders were consolidated with those on the merits in the Eleventh Circuit.[1] That court first rejected the claims that summary judgment was improperly awarded and then turned to the sanctions issues. Initially, it quoted three paragraphs from the first sanctions order, with no mention made of the staggering amount involved. Pet. App. 18a-19a. The court asserted that plaintiffs did not dispute the quoted paragraphs, although it did not explain why that was relevant since all three related to the conduct of Sheehan and Christic. *Id.* The court began its discussion of the sanctions award by stating that "Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit that the complaint was well-grounded in fact," citing to Rule 11 in a footnote. Pet. App. 20a-21a and n.11. The court then focused on the Sheehan affidavit, from which it concluded that it is "obvious that if the appellants [not distinguishing between plaintiffs and their attorneys] knew (*must have known*) prior to filing this lawsuit that they had no *competent* evidence, then this complaint was not well-grounded." *Id.* (emphasis added). To buttress its finding of liability, the court pointed to the fact that "discovery did not yield any witnesses who could link the alleged criminal enterprise to the bombing." *Id.*

Turning to the clarification order, the court of appeals noted

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[1] Sheehan continued as lead counsel on the merits. On the sanctions issue, outside counsel Eugene Scheiman, was brought in to represent plaintiffs and Christic, although Christic attorneys (other than Sheehan) were also on the briefs. Sheehan was represented on the sanctions issue by other outside counsel, Morton Stavis. Mr. Scheiman made the principal argument on the consolidated appeals, although Mr. Sheehan spoke briefly at the end.

that the plaintiffs were found liable "as willful participants in Sheehan's litigation strategy" under the bad-faith exception, this time with a footnote citation to 28 U.S.C. § 1927, which applies only to attorneys. *Id.* at 22a. The court also observed that courts "may assess attorneys' fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith" and then concluded that it had "no difficulty in finding that these appellants unreasonably and vexatiously multiplied these proceedings," without attempting to identify the precise manner in which plaintiffs, as opposed to their attorneys, had done so. *Id.* The court then quoted the portion of *Collins v. Walden*, *supra*, which states that, when "it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest" *id.*, without explaining how even an unjustified failure to abandon a case at some point could possibly sustain an award of $1 million in attorneys' fees accumulated from the beginning of the case to the end.

REASONS FOR GRANTING THE WRIT

The Decisions Below Are Contrary To The Rulings Of This Court And Depart So Far From The Accepted And Usual Course Of Judicial Proceedings As To Raise Fundamental Questions About Denial of Access To The Courts.

Although the petition presents two reasons why review should be granted, they can be summarized in a single proposition: if the decision below is allowed to stand, it will work a dramatic upheaval in the traditional relationship between lawyer and client. Until now, clients were entitled to rely on their lawyers' judgments about the technical aspects of litigation. If their lawyers engaged in misconduct, it was the lawyer, not the client, who paid the price. That is no longer so in the Eleventh Circuit. Massive sanctions have been imposed against plaintiffs solely because they failed to second-guess their lawyers on the highly technical question of whether the evidence that had been gathered before and after the complaint was filed was admissible in a court of law. Thus, under the ruling below, clients become, in essence, the guarantors of the professional judgments of their

attorneys and become liable for a bad faith sanction if they fail to supervise their lawyers adequately. We submit that courts should not, and may not under the American Rule, impose that heavy burden on lay clients.

1. Although couched in other language, the sanctions rulings challenged by plaintiffs are based on the following propositions, viewed in the light most favorable to respondents. After extensive discovery in a civil case for damages, involving a conspiracy to commit murder and other crimes, largely outside of the United States, the petitioners were unable to produce any witnesses or other admissible evidence to establish the causal connection between the bombing, which physically injured the plaintiff Avirgan, and the activities of respondents. Based on this inability, petitioners "must have known" when they filed their complaint two years earlier that they could not produce competent, admissible evidence of their allegations since even their sources had no first-hand knowledge of the facts alleged.

It is this conduct -- and only this conduct -- that led the district court in its initial decision to conclude that plaintiffs had "every reason to know they stood no chance of proving that the defendants were responsible for the injuries to Tony Avirgan," Pet. App. 26a, and that their decision to proceed constituted an abuse of the judicial process for which plaintiffs, not simply their attorneys, were required "to make the defendants whole" by paying all of their attorneys' fees and costs in the action from the time the case was filed. *Id.* Subsequently, in its clarification order, the district court limited the liability of the plaintiffs to the bad-faith exception to the American Rule, which it found to have been violated because they were "willful participants in Mr. Sheehan's litigation strategy," Pet. App. 44a, and perhaps because they were reimbursed for travel and other expenses directly related to the litigation and received compensation for investigative services, although the court never explained the connection between those payments and the bad-faith litigation claim. The court of appeals followed essentially the same approach in upholding the award against plaintiffs, solely on the bad-faith standard.

To begin with, the bad-faith allegations against Sheehan, and

derivatively against Christic, are extremely tenuous. The district court did not find that they actually knew that they could not prove the allegations in the complaint when it was filed or at any time thereafter. Nor did the court find that Sheehan had not undertaken a reasonable investigation before filing. Rather, with the benefit of hindsight, after discovery proved unavailing, the district court concluded that Sheehan "must have known" that he could not prove his case. Even worse, it did not say that the case was groundless, but only that petitioners could not produce "competent" evidence. Focusing on the duty to stop at the point when evidence was not forthcoming, the court said that Sheehan disregarded that duty and then imposed fees against him from the start of the case, not from the point at which he should have known that he could not produce admissible evidence.

Even assuming that such conduct allows for a finding of bad-faith against Sheehan and Christic -- which we believe it does not -- assessing sanctions against their clients, the plaintiffs Avirgan and Honey, requires an unprecedented extension of the bad-faith doctrine. Nothing that the district court relied on was their responsibility, and the only activity that they performed -- preparing the report on the bombing at La Penca -- was never mentioned by the district court in its sanctions opinions, and the court of appeals mentioned it only in the summary judgment section, and then only to note that it was not admissible. Pet. App. 12a. In effect, the courts held that the plaintiffs were vicariously liable because their attorneys had not turned up sufficient admissible evidence to withstand summary judgment. And they applied that ruling not just from the time when it became known that discovery was unsuccessful, but from the start of the case, which resulted in an award of more than $1 million in attorneys' fees and costs.

Moreover, the district court did not find that the allegations in the complaint were groundless, but that there was no competent or admissible evidence to support them. Thus, two individuals, who are not trained in the law, were held liable for not knowing that their report and the other evidence that their attorneys had gathered would not be admissible in a court of law. They were, in essence, penalized $1 million for not knowing that acceptable journalistic standards of proof would not be sufficient in court.

This result, and the inevitable chilling effect that it will have on clients who are considering bringing controversial cases, especially those that are difficult to prove without formal discovery, is a sufficient basis for this Court to grant review.

2. There is yet another reason for the Court to review the $1 million sanction and the grounds on which it was based: it is fundamentally inconsistent with this Court's recent application of the bad-faith exception in *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991). The entire thrust of that decision, which was handed down 12 days before the ruling of the court of appeals and was noted in plaintiffs' suggestion for rehearing *en banc*, is that the bad-faith exception is to be cautiously used, under limited circumstances, and applied only to the most recalcitrant of parties who are personally responsible for conduct found to be an abuse of the judicial process. A brief review of the facts of *Chambers* and its admonitions demonstrates how far the decision below deviates from it in sustaining an award of attorneys' fees under the bad-faith exception.

Mr. Chambers was the defendant in a suit for specific performance of a contract to sell a television station. After vigorously litigating until the eve of trial, Chambers abandoned all of his defenses save one, a legal technicality that was swiftly rejected by the district court and found by the court of appeals to be frivolous. The district judge who had presided over the case and was thoroughly familiar with it then held a sanctions hearing and wrote an opinion running 24 pages in the Federal Reporter, in which he concluded that Chambers was "the strategist" behind a scheme devised "first, to deprive this Court of jurisdiction and, second, to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance." 124 F.R.D. 120, 132, 136 (W.D. La. 1989), *quoted at* 111 S. Ct. 2130-31. The district court specifically found that Chambers had engaged in an attempted fraud on the court, filed false and frivolous papers, and engaged in "other tactics of delay, oppression, harassment, and massive expense to reduce plaintiff to exhausted compliance." 124 F.R.D. at 138, *quoted at* 111 S. Ct. at 2131. As this Court described the basis of the sanction, it was that Chambers' "entire course of conduct throughout the lawsuit

evidenced bad faith and an attempt to perpetuate a fraud on the court. . . ." *Id.* at 2136, and that he was sanctioned "for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation." *Id.* at 2138. This Court further noted the numerous warnings given to Chambers and cited the "frequency and severity of Chambers' abuses of the judicial system" as bases for imposing the sanction. *Id.* at 2139.

Most relevant to this petition, Chambers had claimed that the district court failed to allocate responsibility between him and his attorney. This Court rejected that assertion as "flatly contradicted by the district court's detailed factual findings concerning Chambers' involvement in the sequence of events at issue," noting that the district court had found that the abuse was caused "solely by the relentless, repeated fraudulent and brazenly unethical efforts of Chambers" and others, *quoting* 124 F.R.D. at 136. *Id.* at 2139-40. *See also id.* at 2130, rejecting advice of counsel claim based on similar findings of the district court. Thus, *Chambers* was based on detailed, specific findings of personal wrongdoing on the part of the client, not his attorney, wrongdoing that was intentional, frequent, and severely disruptive of the court and the other party throughout the entire case. *Id.* at 2138. The contrast between the cases could hardly be greater.

Beyond the enormous gulf between the facts found to justify the sanctions in *Chambers* and those found sufficient here by the lower courts, this Court went to great lengths in *Chambers* to explain the very limited circumstances in which the inherent power of the federal courts to award attorneys' fees under the bad-faith exception against lay clients should be exercised. Among the Court's admonitions were the following, all of which the lower courts here violated and, in the case of the court of appeals, disregarded:

- "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Id.* at 2132.

- Attorneys' fees should be imposed under the bad faith

rationale only in "narrowly defined circumstances." *Id.* at 2133.

* The inherent power to award attorneys' fees under the bad-faith exception is limited "to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders." *Id.* at 2134.

* Rule 11 was amended in 1983 "precisely because the subjective bad-faith standard was difficult to establish." *Id.* at 2134 n.11.

* "A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the required bad faith exists and in assessing fees. . . ." *Id.* at 2136.

* The "bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Id.* at 2137.

* Under the bad faith exception, "the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed." *Id.*

* The bad-faith standard is, "of course, punitive" and should be used only where there is a "recalcitrant litigant." *Id.* (quotations omitted).

Indeed, this case is precisely the kind Justice Kennedy envisioned in his dissent in *Chambers*, where he expressed grave concern that the bad faith doctrine and the limited review available for abuse of discretion would mean that the district court would not have to meet any test "other than the talismanic recitation of the phrase 'bad faith' [which] will foreclose meaningful review of sanctions based on inherent authority." *Id.* at 2145.

Chambers is not the only contrary decision of this Court on bad-faith; it is simply the most recent and complete discussion.

Thus, this Court's earlier ruling in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), contains similar warnings that went unheeded below. There, sanctions were sought against attorneys who were found guilty of deliberate inaction and refusal to comply with the court's orders regarding the conduct of the litigation. This Court observed that the bad-faith exception was not limited to those who file in bad-faith, but also applied to those who conducted the litigation in bad-faith. *Id.* at 766. However, the Court cautioned that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion," they should be applied only in "narrowly defined circumstances," and fees should "not be assessed lightly." *Id.* at 764, 765, 767. Although the court of appeals cited *Roadway Express*, Pet. App. 22a, 23a, it plainly did not understand its import.

Of course, the harm from the rulings below extends far beyond the plaintiffs in this case. They have, in essence, been held liable for believing they had a viable case against respondents, a belief that was reenforced by the fact that they had successfully defended a libel action brought against them by the principal respondent, John Hull, based on their report, which formed a significant portion of the basis for the complaint in this case. If that highly unusual pre-filing vindication is not enough, no well advised individual will ever file suit in circumstances remotely resembling these, given the risk of financial ruin from having to pay the attorneys' fees of their opponents.

There is another factor that will surely magnify the difficulty of finding individuals willing to serve as plaintiffs in cases such as this. Although the plaintiffs here sued to recover actual and punitive damages, that plainly was not their sole motivating factor in bringing suit. Indeed, in many civil rights and constitutional law cases there is even less likelihood of financial recovery for the individual plaintiffs, or even a class of plaintiffs, a fact that often discourages individuals from being plaintiffs at all. But when that small possibility of monetary or even psychological gain has to be weighed against the enormous financial risk of sanctions if the suit is not successful, few individuals will be willing to accept those odds.

Moreover, the courts below made no effort to inquire into the relative responsibilities of the plaintiffs and their counsel: they simply held plaintiffs liable under a standard that they "must have known" that the information they had was not admissible evidence. But it is difficult to see how it is proper to sanction lay persons if they have relied on counsel for the sufficiency and admissibility of evidence in order to meet the requirements for suing in federal court. Accordingly, the result below, unless reviewed and reversed by this Court, will send the clearest message to all potential plaintiffs in public interest cases: don't do it.

CONCLUSION

For the foregoing reasons, the petition of Tony Avirgan and Martha Honey should be granted.

Respectfully submitted,

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APPENDIX

[Filed June 18, 1991]

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Tony AVIRGAN and Martha Honey,
Plaintiffs-Appellants,

v.

John HULL, Adolfo Calero, Robert Owen, John K. Singlaub, Ronald Joseph Martin, Sr., James McCoy, Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim, and Richard Secord,
Defendants-Appellees,

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Tony AVIRGAN and Martha Honey,
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John HULL, Moises (Dagoberto) Nunez, Jorge Gonzalez, Adolfo Calero, Robert W. Owen, Thomas Posey, John K. Singlaub, Ronald Joseph Martin, James McCoy, Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim and Richard Secord,
Defendants-Appellees,

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Tony AVIRGAN and Martha Honey,
Plaintiffs-Appellants,

Daniel P. SHEEHAN and The Christic Institute,
Non-Party-Appellants,

v.

John HULL, Moises (Dagoberto) Nunez, Jorge Gonzalez, Adolfo Calero, Robert Owen, John Singlaub, James McCoy, Ronald Joseph Martin, Sr., Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Richard Secord, and Albert Hakim,
Defendants-Appellees,

Rene Corbo, et al.,
Defendants.

Tony AVIRGAN and Martha Honey,
Plaintiffs-Appellants,

Daniel P. SHEEHAN and the Christic Institute,
Non-Party-Appellants,

v.

John HULL, Moises (Dagoberto) Nunez, Jorge Gonzalez, Adolfo Calero, Robert W. Owen, Thomas Posey, John Singlaub, James McCoy, Ronald Joseph Martin, Sr., Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Richard Secord, and Albert Hakim,
Defendants-Appellees,

Rene Corbo, et al.,
Defendants.

Nos. 88-5720, 89-5143, 89-5232
and 89-5515.

Appeals from the United States District Court for the Southern District of Florida.
(D.C. No. JLK-CIV-86-1146)

Michael W. Burnbaum, Coral Gables, Florida; Raul de Cubas of Diaz Silviera and Associates, Coral Gables, Florida; Robert F. Garcia-Esquerro, Miami, Florida; Thomas C. Green and Paul Castellitto of Green & Lankford, Washington, D.C.; Leonard Greenbaum and Thomas Hylden of Sachs, Greenbaum & Taylor, Washington, D.C.; Theodore Klein of Fine, Jacobson, Schwartz, Nash, Block & England, Miami, Florida; Luis S. Konski of Walton, Lantaff, Schroeder & Carson, Miami, Florida; Jack McKay and Jane Sullivan of Shaw, Pittman, Potts & Trowbridge, Washington, D.C.; Joseph Portuondo of Fitzgerald, Portela & Portuondo, Miami, Florida; Edwin R. Smith, Evansville, Indiana; Thomas R. Spencer of Spencer, Bernstein, Seeman & Klein, Miami, Florida; for Defendants-Appellants.

Eugene R. Scheiman, New York, New York; Daniel P. Sheehan of the Christic Institute, Washington, D.C. (Phil Hirschkop, Alexandria, Virginia; Joanne Royce and Lanny Sinkin of the Christic Institute, Washington, D.C., with them on the briefs) for Plaintiff-Appellees.

Eugene R. Scheiman, New York, New York; (Joanne Royce and Lanny Sinkin of the Christic Institute, Washington, D.C., with him on the briefs) for Appellee the Christic Institute.

Morton Stavis of Center for Constitutional Rights, New York, New York (Joan Gibbs, Katherine Gorove, and Stephanie Y. Moore of Center for Constitutional Rights, New York, New York with him on the briefs) for Appellee Daniel

P. Sheehan.

Before HATCHETT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

HATCHETT, Circuit Judge:

Two journalists, their lawyers, persons and entities associated with the journalists and lawyers, in this consolidated appeal involving the Nicaraguan Contra affair, seek reversal of the district court's orders granting summary judgment against them and imposing sanctions in excess of one million dollars. We affirm the district court.

FACTS

On May 30, 1984, Tony Avirgan and his wife, Martha Honey, appellants, who are American journalists based in Costa Rica and cover Central America for various news agencies, attended a press conference of Contra leader Commandant Eden Pastora at the campground of the Southern Contra Force in La Penca, Nicaragua. About thirty journalists traveled to the guerilla campground. At the press conference, a bomb exploded killing eight people and wounding numerous others. Avirgan and Honey allegedly suffered personal injuries, damages to television camera equipment, loss of business due to the bombing, and loss of consortium. Avirgan and Honey claim that the bombing was the product of a criminal racketeer influenced and corrupt organization (RICO) enterprise consisting of the appellees

with the goal of overthrowing the government of Nicaragua.[1] The appellees include alleged Central Intelligence Agency operatives, military intelligence personnel, arm merchants, mercenaries, and Colombian drug lords. Most of the allegations are based geographically in Nicaragua, but some allegations accuse various appellees of anti-communist operations in Cuba, Southeast Asia, Iran, Libya.

Chief Judge James Lawrence King, in his thorough opinion, summarized Avirgan and Honey's theory of their case as follows:

> It is the theory of plaintiffs' case that the defendants established an enterprise, the purpose of which was to violate the principles espoused in the Neutrality Act and that all of the alleged patterns of racketeering activity were performed to promote the goal of this enterprise. Central to the alleged violations of each subsection of § 1962 is the plaintiffs' purported Neutrality Act enterprise. The plaintiffs allege that in May, 1983 the defendants

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[1] The status of persons involved in these cases is as shown below:
Appellants: Tony Avirgan (Plaintiff), Martha Honey (Plaintiff), The Christic Institute, and Daniel P. Sheehan.
Appellees: John Hull, Moises Dagoberto Nunez, Jorge Gonzalez, Adolfo Calero, Robert W. Owen, John K. Singlaub, Ronald Joseph Martin, Sr., James McCoy, Thomas Posey, Rafael Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim, and Richard Secord.
Defendants only: Bruce Jones, Rene Corbo, Francisco Chanes, Ricardo Gris, William Gris, Robert P. Pallais, Hector Cornillot, and Frederico Saenz.
Named as defendants but not served: Felipe Vidal Santiago, Ramon Cecilio Palacio, Amac Galil, Alvaro Cruz, Pablo Escobar, and Jorge Ochoa.

Francisco Chanes, Moises Nunez, Hector Cornillot, Rene Corbo and Felipe Vidal Santiago established an enterprise. The purpose of the enterprise was to launch a Cuban/American mercenary expeditionary force against the Republic of Nicaragua, from Costa Rica, along the 'Southern Front.'

The plaintiffs also contend that these defendants established a cocaine smuggling operation through Costa Rica to finance the workings of this enterprise in violation of the Neutrality Act. 18 U.S.C. § 960 (1986). It is asserted that the original purpose of these individuals was to assist an indigenous Nicaraguan group, the Revolutionary Democratic Alliance ('ARDE').

The ARDE was engaged in guerilla attacks against Nicaragua under the leadership of Eden Pastora. The plaintiffs maintain that sometime after this original joinder of forces the enterprise decided to remove Pastora as leader of ARDE in order to merge ARDE into alliance with the Honduras based contra group, the Nicaraguan Democratic Force ('FDN') and facilitate its narcotics trafficking in Costa Rica.

Avirgan v. Hull, 691 F.Supp. 1357, 1363-64 (S.D.Fla.1988).

PROCEDURAL HISTORY

On May 29, 1986, Avirgan and Honey filed a complaint in the United States District Court for the Southern District of Florida. Avirgan and Honey's racketeering allegations include the following: the attempted murder of Eden Pastora; the murder of eight persons at the press conference in La Penca; the attempted murder of Avirgan at the La Penca bombing; the trafficking of arms and explosives in violation of state and federal law; the transferring of funds from illegal weapons and explosives dealings; the conspiracies to murder Pastora on two occasions; the conspiracy to kidnap

informants - Carlos Rojas Chinchilla and a person identified only as "David"; the murder of David; the conspiracy to transport cocaine into the United States; and the conspiracy to murder the United States Ambassador to Costa Rica. The primary allegation, however, is that Amac Galil, disguised as a journalist named Per Anker Hansen, detonated the bomb at the La Penca press conference, and acted in concert with the twenty-eight other persons named in the amended complaint.

Avirgan and Honey also allege state law claims which include: battery, loss of consortium, assault, intentional infliction of mental distress, trespass, damage to personal property, and a state RICO claim under Fla.Stat.Ann. § 895.03.

In their amended complaint, Avirgan and Honey specified the relevant time period as May, 1983, through May 29, 1986. Thus, for discovery purposes, the court granted the time limit specified plus six months before the first alleged overt act, which occurred in May, 1983. The district court limited discovery to a four-year period covering the relevant alleged conspiratorial time period of December, 1982, until November, 1986. The district court also limited the subject matter discovery to the purchase or sale of military equipment; weapons; or explosives; transactions in illegal drugs; the operation of the alleged Neutrality Act enterprise; and any action resulting in or causing injury to Avirgan and Honey.

After two years of discovery, several appellees moved for summary judgment alleging that Avirgan and Honey had failed to state a claim under RICO. In addressing this motion, the district court thoroughly analyzed the evidence Avirgan and Honey presented, in order to determine whether they had shown genuine issues of material fact. Finding

much of the evidence inadmissible, the district court ruled that Avirgan and Honey failed to prove that the appellees were the proximate cause of their injuries and granted appellees' motions for summary judgment on the federal and state law claims.[2]

The district court, by a subsequent order, granted appellees' motions for costs and attorney's fees, ruling that the abuse of the judicial process required that Avirgan and Honey make the appellees whole by paying the fees the appellees were forced to spend in defending the lawsuit. Moreover, the district court ruled that liability for costs and fees rests jointly and severally with Avirgan and Honey, Daniel Sheehan (Avirgan and Honey's lawyer) and the Christic Institute.[3]

On appeal, this court consolidated appellants appeals of the district court's (1) grant of summary judgment; (2) the award of attorney's fees and costs; (3) motions for clarification order; and (4) the clarification order.[4]

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[2] Avirgan and Honey do not challenge the grant of summary judgment on the state law claims. As such, we deem those claims abandoned. *Rogero v. Noone*, 704 F.2d 518, 529 n. 1 (11th Cir.1983).

[3] The Christic Institute is a tax-exempt law firm which funded the litigation.

[4] The appeal on the merits is 88-5720; the other three appeals are from the district court's orders on fees (89-5143, 89-5232, and 89-5515).

On appeal, numerous persons and entities appeared, through brief, as amicus curiae, including: Church of the Brethren, Church Women United, Conference of Major

CONTENTIONS

Avirgan and Honey contend that the district court ruled improperly in granting summary judgment, in issuing certain orders prior to summary judgment, and in denying relief for cost of injury and equipment due to the bombing. Additionally, Avirgan, Honey, the Christic Institute, and Daniel Sheehan challenge the award of costs and attorneys' fees.

The issues presented on appeal are: (1) whether the district court properly granted summary judgment on the ground that the appellants failed to show that the appellees caused their injuries; (2) whether the district court erred in issuing certain orders prior to summary judgment; and (3) whether the district court erred in awarding attorneys' fees and costs to the appellees.[5]

DISCUSSION

Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious, the Maryknoll Fathers and Brothers, General Conference Mennonite Church, National Council of Churches of Christ in the U.S.A., Unitarian Universalist Association, the Womens Division of the United Methodist Board of Global Ministries; Professor Melissa Nelken, Professor Carl Tobias, Professor Mary Twitchell, Trial Lawyers for Public Justice, and Public Citizen and Alliance for Justice.

[5] Avirgan and Honey also request damages for injuries and ask that if the case is remanded for further proceedings, the proceeding not be conducted by Chief Judge James L. King. Since we affirm the district court, these issues are moot.

1. Summary Judgment

[1,2] Consideration of the district court's grant of summary judgment requires plenary review and application of the same legal standards that bound the district court. *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1527 (11th Cir.1987). If the party seeking summary judgment meets the initial burden of demonstrating the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(e). A nonmoving party, opposing a motion for summary judgment supported by affidavits cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial. *Fontenont v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir.1986). The evidence presented cannot consist of conclusory allegations or legal conclusions. *First National Bank of America v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

A. RICO Claim

[3] Avirgan and Honey's RICO claim is founded upon 18 U.S.C. § 1964(c).[6] Thus, they must prove three essential elements: (1) a violation of section 1962; (2) injury to business or property; and (3) that the violation caused the

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[6] Title 18 U.S.C. § 1964(c) reads as follows:
Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

injury. *O'Malley v. O'Neill* 887 F.2d 1557, 1561 (11th Cir. 1989).

> Sections 1962(a), (b), and (c) of title 18 make criminally liable those who engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate section 1962(a), (b), or (c). [Footnote omitted.]

Pelletier v. Zweifel, 921 F.2d 1465, 1495-96 (11th Cir.1991).

1. Evidence

As to the evidence Avirgan and Honey presented, the district court found:

> The plaintiffs have not made a showing of a genuine issue of material fact with respect to any of their allegations concerning the cause of their injuries. Causation is an essential element of a RICO action. Accordingly, the defendants who have moved are entitled to summary judgment.

Avirgan, 691 F.Supp. at 1377.

[4] Avirgan and Honey argue that they were not obligated to produce evidence gathered during pretrial discovery which demonstrated that Galil had committed the bombing and was

a member of the enterprise, that C-4 was an ingredient of the bomb, or that they and their news sources were threatened and had crimes committed against them. We disagree. The evidence Avirgan and Honey presented is scant, almost nonexistent, on the important issue of causation. Avirgan and Honey presented the *La Penca Report*, a publication they prepared, which concludes that Amac Galil, a/k/a Per Anker Hansen caused the bombing. The district court correctly determined that this evidence was inadmissible.

Also, Avirgan and Honey submitted a one-page translation of a five-page document the Costa Rican OIJ prepared. The OIJ, according to Avirgan and Honey, is the Costa Rican equivalent to the United States Federal Bureau of Investigation (FBI). The translation is uncertified, unsigned, and does not conclude that Galil was responsible for the bombing. It merely concludes that debris found at the sire of the bombing matched that of a box Galil carried. This evidence is circumstantial, speculative, and of little weight.

Avirgan and Honey further argue that because none of the appellees disputed Galil's role in the bombing, summary judgment was improper. According to Avirgan and Honey, although some appellees claim that they did not know Amac Galil or have direct or indirect contact with him, this does not mean that all of the appellees are unassociated with the enterprise. In other words, Avirgan and Honey argue that no one has disproved Galil's existence, or disproved the existence of the enterprise, or disproved Galil's association with the enterprise. Thus, say Avirgan and Honey, the enterprise existed; Galil existed; Galil set off the bomb; and we were injured.

[5] Avirgan and Honey note that this circuit has ruled that a RICO enterprise may be an "amoeba-like" structure or a loose informal association. See *United States v. Cagnina*, 697

F.2d 915, 921 (11th Cir.1983), *cert. denied*, 464 U.S. 856, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983). We have so held. Nevertheless, Avirgan and Honey presented no evidence to indicate that Galil committed the bombing or was a part of the alleged enterprise. No admissible evidence was ever produced to show that Galil even existed.[7] The evidence completely failed. Galil was never served with a complaint or scheduled for deposition. All parties realized that responsibility for the La Penca bombing was a key issue on summary judgment. Yet, Avirgan and Honey, after years of discovery, brought forth nothing on the causation issue.

[6] Likewise, without submitting admissible evidence, Avirgan and Honey alleged that the appellees were liable for threats to and the kidnapping of Carlos Rojas Chinchilla and the murder of "David." According to Avirgan and Honey, Chinchilla and David served as their informants about the bombing. They specifically named Hull, Jones, Corbo, Vidal, Chanes, Nunez, Cruz, Saenz, Posey, Owen, and Palacio as participants in the crimes against David and Carlos, both individually and through agents. Avirgan and Honey assert that only three appellees, Hull, Owen, and Jones, moved for summary judgment.[8] They argue that Owen was in Central

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[7] At one point, Avirgan and Honey argue that Theodore Shackley's counsel admitted Galil's existence. Shackley's counsel's statement was, "I don't believe that the plaintiffs have any proof that any of the defendants was engaged in the La Penca bombing or connected to the La Penca bombing other than this fellow that they describe as Amac Galil." This statement is not evidence that counsel admitted Galil's alleged role in the bombing.

[8] The following persons filed motions for summary judgment: Jones, Owen, Hull, Calero, Singlaub, Shackley, Martin, McCoy, Quintero. Delamico, Clines, Hakim, and

America at the time of an execution of a "Sandinista informant" believed to be David. According to Avirgan and Honey, it was Owen's responsibility to demonstrate that the executed Sandinista informant was not David, or prove that he had no knowledge of, or did not condone the execution. It is their theory that the omission of this evidence, which Owen did not produce, should serve as a favorable inference for them. *Lampkin v. Liberia Athene Transport Co., Ltd.*, 823 F.2d 1497, 1499 (11th Cir.1987). This absence of evidence does not result in a favorable inference.

Avirgan and Honey further contend that Hull, Jones, Corbo, Vidal, Chanes, Nunez, Cruz, Saenz, Posey, and Owen threatened to murder them because they connected Hull and Vidal to the threats against their family. Again, theories, allegations, and speculation; but, no evidence.

2. Causation

[7] In a civil RICO action, the plaintiff must prove that the criminal conduct in violation of section 1962 directly or indirectly injured the plaintiff's business or property. *Haroco v. American Bank and Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir.1984), *aff'd*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

Secord. Gonzalez filed an untimely summary judgment motion.

Defendants Santiago, Palacio, Galil, Cruz, Escobar, and Ochoa were never served and were dismissed.

Nine defendants did not move for summary judgment: Corbo, Nunez, Chanes, R. Gris, W. Gris, Pallais, Cornillot, Saenz, and Posey. Nunez moved, after the pretrial conference, to vacate the entry of default against him and to quash the service of process.

[8] Avirgan and Honey emphasize that the district court was required to provide them with notice of its intention to consider the causation issue, and it did not do so. We reject this argument. Appellees' numerous summary judgment motions presented the causation issue. For example, Owen's summary judgment motion asserted that no evidence supported the theory that Galil was linked to the bombing or to the alleged enterprise. In this motion, Owen also challenged whether any evidence supported the kidnapping of Chinchilla, the kidnapping and threatening of David, the threats to murder (Chinchilla, David, Avirgan, Honey), and the attempted assassination of Pastora.

In practically every motion for summary judgment, the appellees asserted that they had no involvement, directly or indirectly, in the La Penca bombing, that they were not the cause of any of the injuries, and that they were not and had never been members of an alleged enterprise. The appellees' affidavits, answers to interrogatories, and depositions put Avirgan and Honey on notice that causation was a principal issue. Consequently, the district court acted properly in granting summary judgment on the ground that Avirgan and Honey failed to prove that the appellees caused the injuries.

[9] Avirgan and Honey's additional allegation is that Galil used C-4 explosives in the La Penca bombing. For this assertion, they rely upon the deposition of Fernando Cruz Castro. The district court found that Avirgan and Honey evidently asked Cruz Castro to recall a letter or some other writing which suggested that Per Anker Hansen (Galil) committed the La Penca bombing. Cruz Castro's affidavit seeks to recite the contents of the letter or other writing from memory. The district court found, and we agree, that Cruz Castro's affidavit was not admissible. No other evidence linked Galil or any appellee to C-4 explosives.

B. Discovery

Avirgan and Honey also contend that the district court erred in granting summary judgment because the appellees had not complied with discovery requests or the court's orders compelling discovery. The record does not support this contention. All appellees, except Corbo, submitted affidavits, answered interrogatories, and/or provided sworn depositions denying responsibility, directly or indirectly, for the La Penca bombing. Owen, Singlaub, and Calero gave lengthy and complete depositions; Hull and Secord gave incomplete depositions because of Avirgan and Honey's delay in setting dates; Posey, Quintero, and Hakim invoked their fifth amendment privilege; Shackley and Clines were never noticed for deposition. All appellees served with interrogatories responded, and all appellees who moved for summary judgment submitted sworn affidavits. Furthermore, Avirgan and Honey had the benefit of public information generated by the Iran/Contra affair, including the extensive testimony of Secord, Hakim, Owen, Singlaub, Calero, and numerous other witnesses in public hearings.

[10] In this RICO proceeding which involves some alleged criminal activity, Avirgan and Honey should have anticipated that some appellees would impose their fifth amendment rights. Invocation of the amendment privilege did not give rise to any legally cognizable inferences sufficient to preclude entry of summary judgment. The negative inference, if any, to be drawn from the assertion of the fifth amendment does not substitute for evidence needed to meet the burden of production. *United States v. Rylander*, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983). Most importantly, Avirgan and Honey did not demonstrate that further discovery would have led to evidence which would have precluded summary

judgment based on causation.[9]

II. Orders Prior to Summary Judgment

[11] Avirgan and Honey also contend that the district court erred in the issuance of orders prior to summary which restricted discovery and denied them the right to file a third amended complaint. We review these claims under an abuse of discretion standard. *Edward Leasing Corp. v. Uhlig and Associates, Inc.*, 785 F.2d 877 (11th Cir.1986).

A. Discovery Limitations

Avirgan and Honey contend that the district court's order restricting discovery to evidence for the period 1983 through 1986 of only one venture of the alleged RICO enterprise, and only those subjects related to the La Penca bombing, deprived them of an opportunity to conduct adequate discovery.

[12] Despite these assertions, prior to filing the first complaint, Avirgan and Honey boasted of a two-year investigative period, and after filing enjoyed an additional two years of discovery. Where a significant amount of discovery has been obtained, and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied. *Aviation Specialties, Inc.*

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[9] Avirgan and Honey had two years to conduct discovery and seven and one-half months advance warning of the discovery cut-off date. Knowing this, they took absolutely no discovery during the first nine months after filing the case and little more until January, 1988. During the final 4 1/2 months of discovery, Avirgan and Honey filed 153 deposition notices. It is clear that Avirgan and Honey's actions caused delay in discovery, not the appellees.

v. United Technologies Corp., 568 F.2d 1186, 1189 (5th Cir.1978).

[13] Thus, the time and subject matter restrictions imposed by the district court did not deprive Avirgan and Honey of an opportunity to conduct adequate discovery. Moreover, the order did not prohibit discovery into causation, which was the dispositive issue. The district court has wide discretion in determining the scope and effect of discovery, and it did not abuse its discretion when it imposed time and subject matter restrictions in this case. *See Amey, Inc. v. Gulf Abstract and Title, Inc.*, 758 F.2d 1486, 1505 (11th Cir.1985), *cert. denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986).

B. Third Amended Complaint

[14] Avirgan and Honey also challenge the district court's denial of their motion to file a third amended complaint. Avirgan and Honey acknowledge that the third amended complaint would not have altered the claims against the appellees or added new parties, causes of action, or additional relief. Consequently, a third amended complaint was unnecessary. Avirgan and Honey needed proof, not more pleadings. The district court did not abuse its discretion in denying the filing of a third amended complaint.

III. Attorneys' Fees

In its order awarding costs and attorney's fees, the district court stated:

> The attorneys for the plaintiffs, The Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint. Plaintiffs' lead counsel, Daniel Sheehan,

supplemented the complaint with a detailed affidavit outlining the purported testimony of seventy-nine witnesses who Mr. Sheehan stated had factual knowledge that these defendants set and exploded the bomb that caused plaintiff's injuries.

The seventy-nine witnesses were identified only by number. Plaintiffs' counsel refused to identify the names and addresses of the vast majority of the seventy-nine witnesses until ordered to do so by the court. Plaintiffs appealed the order requiring them to disclose the identities of the witnesses. These actions by plaintiffs and their counsel prevented the defendants from taking depositions of these witnesses, and delayed orderly discovery for many months.

After all the appeals were exhausted and plaintiffs complied with the order to reveal the names of their witnesses, the reason for the plaintiffs' adamant refusal became apparent. Specifically, the names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or the plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statements that would be admissible. Much of the testimony of these witnesses involved conversations they allegedly had with other people, which is the hearsay testimony inadmissible at a trial.

Avirgan v. Hull, 705 F.Supp. 1544, 1545 (S.D.Fla.1989). Avirgan and Honey do not dispute the district court's statements. The other appellants, in the fee portion of the case, do not dispute the statements.

The district court awarded costs to the appellees pursuant to Federal Rule of Civil Procedure 54(d), and 28 U.S.C. § 1920, which lists the items that may be reimbursed as costs.[10] Avirgan and Honey argue that what the attorneys "must have known" is not the proper standard for the grant of attorneys' fees, but is the standard for the imposition of sanctions. Thus, in their opinion, the district court impermissibly "guised its Rule 11 sanctions as a grant of summary judgment."

Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit

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[10] Federal Rule of Civil Procedure 54(d) provides in pertinent part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.
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> Title 28 U.S.C. § 1920 provides:
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> Taxation of costs
>
> A judge or clerk of any court of the United States may tax as costs the following:
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> (1) Fees of the clerk and marshal:
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> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
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> (3) Fees and disbursements for printing and witnesses;
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> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
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> (5) Docket fees under section 1923 of this title;
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> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

that the complaint was well-grounded in fact.[11] Particularly is this true of the affidavit with its unknown, nonexistent, deceased sources, its fabricated testimony, and the deceptive style used to mask its shortcomings. It is obvious that if the appellants knew (must have known) prior to filing this lawsuit that they had no competent evidence, then, this complaint was not well-grounded. Additionally, the district court stated in its order granting attorney's fees and costs that Sheehan's affidavit was the impetus for the two years of discovery. Yet, this discovery did not yield any witnesses who could link the alleged criminal enterprise to the bombing.

[15,16] In its clarification order, the district court explained that Daniel Sheehan, as lead counsel, and the

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[11] Federal Rule of Civil Procedure 11, in pertinent part provides:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Christic Institute, as the official law firm, were liable pursuant to the bad-faith exception, 28 U.S.C. § 1927, and Federal Rule of Civil Procedure 11, while Avirgan and Honey, as willful participants in Sheehan's litigation strategy, were liable under the bad-faith exception.[12] 125 F.R.D. 189. A court may assess attorney's fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith. *Roadway Express Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). On this record, we have no difficulty in finding that these appellants unreasonably and vexatiously multiplied these proceedings.[13] It is well established that:

> Although a litigant proceeding in good faith has a right to use civil discovery in attempts to prove the existence of a colorable claim for relief, filing a lawsuit is not a gratuitous license to conduct infinite forays in search of evidence. When it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest.

Collins v. Walden, 834 F.2d 961, 965 (11th Cir.1987). Since

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[12] Title 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

[13] At oral argument, appellants admitted they had spent more than $2 million on this case although, under the best scenario, they did not expect to collect half that amount.

Sheehan, the Christic Institute, Avirgan, and Honey chose not to abandon this case, the district court properly awarded attorney's fees and costs to the appellees.

[17] Furthermore, the district court's order does not infringe upon the appellants' right of access to the courts, or first amendment rights of free association, or Sheehan's professional obligation to represent clients zealously. Status as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits. *See Roadway Express*, 447 U.S. at 762, 100 S.Ct. at 2462; *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986). Accordingly, we affirm the district court's award of attorney's fees and costs.

CONCLUSION

Accordingly, we affirm the judgments of the district court.

AFFIRMED.

[Entered 2 February, 1989]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1146-CIV-KING

TONY AVIRGAN and MARTHA HONEY,

Plaintiffs,

v.

JOHN HULL, et. al.,

Defendants.
_____/

ORDER GRANTING MOTIONS FOR COSTS AND ATTORNEYS' FEES

Tony Avirgan was injured by the explosion of a bomb in the jungle at La Penca, Nicaragua. He accused the defendants of exploding the bomb in an attempt to assassinate Eden Pastora, a contra leader. After two years of protracted and extensive discovery of scores of witnesses across the United States, Costa Rica, and elsewhere, the plaintiffs were unable to produce a single witness who could state that the defendants exploded the bomb or were responsible for the assassination attempt. See Avirgan v. Hull, 691 F.Supp 1357 (S.D. Fla. 1988).

The attorneys for the plaintiffs, The Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint. Plaintiffs' lead counsel, Daniel Sheehan,

supplemented the complaint with a detailed affidavit outlining the purported testimony of seventy-nine witnesses who Mr. Sheehan stated had factual knowledge that these defendants set and exploded the bomb that caused plaintiff's injuries.

The seventy-nine witnesses were identified only by number. Plaintiffs' counsel refused to identify the names and addresses of the vast majority of the seventy-nine witnesses until ordered to do so by the court. Plaintiffs appealed the order requiring them to disclose the identities of the witnesses. These actions by plaintiffs and their counsel prevented the defendants from taking depositions of these witnesses, and delayed orderly discovery for many months.

After all the appeals were exhausted and plaintiffs complied with the order to reveal the names of their witnesses, the reason for the plaintiffs' adamant refusal became apparent. Specifically, the names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or the plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statements that would be admissible. Much of the testimony of these witnesses involved conversations they allegedly had with other people, which is the hearsay testimony inadmissible at a trial.

Based upon the affidavit of plaintiffs' counsel, the plaintiffs were permitted to conduct two years of discovery. This discovery failed to produce any admissible evidence regarding causation. See Avirgan, 691 F.Supp 1357. The Christic Institute's allegations, essentially maintaining that the plaintiffs were victims of a wide-ranging conspiracy spanning thirty years and involving the activities of former United

States Government officials, CIA operatives, Colombian druglords and arms merchants in Cuba, Southeast Asia, the Middle East, and Central America, were based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge. These actions establish that plaintiffs "had every reason to know they stood no chance of proving" that the defendants were responsible for the injuries to Tony Avirgan. Collins v. Walden, 834 F.2d 961, 964 (11th Cir. 1987). This abuse of the judicial process requires that the plaintiffs make the defendants whole by paying the fees the defendants have been forced to expend for attorneys in this action. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Collins, 834 F.2d at 964; Gordon v. Heimann, 715 F.2d 531 (11th Cir. 1983); see also 28 U.S.C. § 1927 (1986).

DISCUSSION

The motions for costs and attorney's fees filed by the prevailing defendants are the last remnants of this case. The court now addresses the questions raised by these motions.

A. COSTS

Normally, an award of costs is relatively straight forward. Federal Rule of Civil Procedure 54(d) provides that a court may tax costs in favor of the prevailing party. The particular costs that can be taxed are detailed in 28 U.S.C. § 1920. This section expressly provides that the following items may be taxed as costs:

1) Fees of the clerk and marshal;
2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
3) Fees and disbursements for printing and witnesses;

4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
5) Docket fees under section 1923 of this title;
6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Some of the successful defendants have filed Bills of Costs. Although the plaintiffs have failed to make specific objections to requested costs, the court will analyze the requests and determine the appropriate amounts based on the statutory guidelines. Specifically, the court will disallow "costs" that are not set out in 28 U.S.C. § 1920. See Crawford Fitting Company v. J. T. Gibbins, Inc., 107 S.Ct 2494 (1987).

1. ADOLFO CALERO

Defendant Calero filed an affidavit listing costs totalling $1,935.64. The affidavit states that the following costs have been expended in connection with the defense of this case:

DISBURSEMENTS	AMOUNT
Messenger Service	$80.00
Postage	102.94
Photocopies	1,225.65
Parking	10.10
Mileage	1.20
Telefax Transmissions	34.00
Word processing costs	280.00
Depositions	201.75
TOTAL DISBURSEMENTS:	$1,935.64

The statutory provision does not provide for the taxation of messenger service, postage, parking, mileage, telefax and

word processing costs, so the court disallows the requested costs. The request for "deposition" costs presumably is for costs incident to taking a deposition. The court, consequently, taxes as costs the "deposition" and the photocopying of depositions. Plaintiff Calero, therefore, is awarded $1,427.40 in costs.

2. JOHN HULL

Hull has listed four types of costs in his Bill of Costs. He requests the following costs:

DISBURSEMENTS	AMOUNTS
Fees for exemplification and copies of papers necessarily obtained for use in case	$1,058.75
Costs incident to taking of depositions	1,602.70
Long distance phone expense	148.98
Postage	204.82
TOTAL DISBURSEMENT:	$3,015.25

Because 28 U.S.C. § 1920 does not provide for them, the court disallows the long distance phone charges and again denies the postage costs. The defendant is entitled to $2,661.45 in taxable costs.[1]

3. MOISES NUNEZ RUIZ

Nunez Ruiz has listed two expenses, both of which are

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[1] This defendant, like several others, has filed a motion under Rule 30(g)(2) for fees and cost. The defendant, however, has not listed these expenses, so the court presumes the amount allowed under 30(g)(2) is included in the total request.

enumerated in § 1920. Specifically, he has made the following requests:

DISBURSEMENTS	AMOUNTS
Fees for printing	$644.85
Translating services	92.00
TOTAL DISBURSEMENT	$736.85

The prevailing defendant is entitled to these specifically enumerated costs totalling $736.85.

4. ROBERT OWEN

Defendant Owen submitted a Bill of Costs that contained the following two items:

DISBURSEMENTS	AMOUNTS
Fees for copies of papers necessarily obtained for use in the case	$2,844.00
Costs incident to taking of depositions	2,774.90
TOTAL DISBURSEMENTS	$5,663.90

The defendant provided detailed attachments to indicate the necessity of these items. The court, accordingly, awards costs totalling $5,663.90 for defendant Owen.

5. RICHARD SECORD

The following requests were filed by defendant Secord:

DISBURSEMENTS	AMOUNTS
Transcripts	$2,925.30
Xeroxing	2,283.10
Courier Service	958.95

Telecopy and Telex	225.00
Postage	401.88
Telephone	834.75
Travel Expenses	7,112.04
TOTAL DISBURSEMENTS:	$14,741.02

Because the statute does not allow courier services, telecopy, telex, postage, telephone, and travel expenses, these amounts are disallowed. The request for transcripts and xeroxing expenses is appropriate, so the defendant is entitled to $5,208.40 for costs.

6. RONALD MARTIN, JAMES McCOY and MARIO DELL AMICO

All three defendants were represented by the same law firm. The attorney stated in the Bill of Costs that costs incident to taking of deposition and the copying is $4,373.85. These requests are entirely appropriate and the court grants the request. The defendants also ask for the following other costs:

DISBURSEMENTS	AMOUNTS
Air Fare	$154.00
Long distance telephone	365.98
Messenger service	230.90
Postage	128.25
Secretarial overtime	200.98
Telecopying	232.00
Parking and other miscellaneous costs	140.48
Legal research costs	157.50
Word processing costs	42.00
Word processing overtime	45.00
TOTAL DISBURSEMENT:	$1,647.04

Section 1920 does not provide for any of these costs, so they are all disallowed. Consequently, the court awards only $4,373.85.

7. RAFAEL QUINTERO, THOMAS CLINES and ALBERT HAKIM

Like the previous defendants, Quintero, Clines and Hakim all retained one law firm. The law firm submitted the following list of costs:

DISBURSEMENTS	AMOUNTS
Xeroxing	$1,167.00
Courier services	144.40
Telephone and telecopy	193.17
Postage	162.73
Travel expenses	2,162.47
5% Fla. Sales Tax 7/1 - 12/31/87	8.12
TOTAL DISBURSEMENTS:	$3,837.89

All of these expenses, except xeroxing, are disallowed because they fall outside the statute. The court does allow the photocopying expenses totalling $1,167.00 as recoverable costs.

8. JORGE GONZALEZ

Through an attorney's affidavit, defendant Gonzalez requests the following necessarily incurred disbursements:

DISBURSEMENTS	AMOUNTS
Postage	$65.25
Long distance telephone calls	12.34
Courier services	16.85
Photocopies	798.30
TOTAL DISBURSEMENTS:	$892.74

Most of the requested costs are not within the statutory provision. The only recognized cost is for photocopying. Accordingly, the court taxes as cost $798.30 for photocopies.

9. JOHN SINGLAUB

Defendant Singlaub vigorously defended against this case and, consequently, has submitted two Bills of Costs totalling more than $100,000. The list of costs, consisting of 28 pages, can be summarized as follows:

DISBURSEMENTS	AMOUNTS
Fees of court reporter for transcripts necessarily obtained for use in the case	$24,698.48
Fees and disbursements for printing	2,194.74
Fees for witnesses	177.00
Fees for exemplification and copies of papers necessarily obtained for use in case	19,271.59
Docket fees under 28 U.S.C. § 1923	20.00
Long distance phone calls	3,241.49
Witness subpoenas	280.00
Postage and delivery	16,919.82
Overtime office expenses	6,300.50
Interpreter costs	168.76
Travel expenses	30,875.09
Miscellaneous	4,469.89
TOTAL DISBURSEMENTS	$108,617.36

Despite the defendant's detailed report, the plaintiffs failed to specifically object. The court, however, is guided by the statutory guidelines set forth in § 1920 and disallows the requests not listed in the statute. The defendant, consequently, is not entitled to expenses for long distance phone calls, witness subpoenas, postage, delivery, overtime

staff, travel and miscellaneous cost. With these costs deleted, the defendant's total allowed amount is $46,530.57.

In addition to the costs allowed under Rule 54(d), the defendant has submitted a request for costs and fees under Rule 30(g)(2) based on the plaintiffs' failure to properly subpoena witnesses noticed for deposition or otherwise adequately arrange for their attendance at the depositions in Costa Rica.[2] Because of the plaintiffs' failure, defendant Singlaub incurred the following expenses:

DATE	DESCRIPTION	AMOUNTS
5-1-88	Airfare Miami/San Jose, C.R.	$280.00
5-1-88	Departure Tax	10.00
5-1-88	Attorney's Fees/Preparation for Depositions	400.00
5-2-88	Attorney's Fees/Wasted Day	800.00
5-2-88	Two Meals	14.00
5-2-88	Transcript of Proceedings and Appearance	127.50
5-4-88	Hotel Bill	105.00
5-4-88	Cab ride to airport	10.00
5-4-88	Departure Tax	4.50
5-4-88	Airfare San Jose/Miami	280.00
5-4-88	Attorney's Fees/Travel Time	400.00
7-8-88	Attorney's Fees/Preparation of this Motion	100.00

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[2] The transcript of the deposition demonstrates that the plaintiffs did not take the appropriate measures to insure the witnesses' attendance at the deposition. The court finds that Rule 30(g)(2) of the Federal Rules of Civil Procedure applies and the plaintiffs should compensate the defendants for these unnecessary expenses.

TOTAL $2,531.00[3]

The court grants all of these expenses, so the defendant's total amount allowed is $49,061.57.

10. THEODORE SHACKLEY

Defendant Shackley has filed a Bill of Costs for $20,330.06. The defendant requests the court to tax the following as costs:

DISBURSEMENT	AMOUNT
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	$795.50
Fees for witnesses	35.00
Fees for exemplification and and copies of papers necessarily obtained for use in the case	8,072.14
Computer legal research	5,189.99
Travel	2,043.11
Telephone and telecopier	963.59
Postage and delivery	1,601.68
Staff overtime	615.30
Interlibrary loans	153.83
Miscellaneous	859.92
TOTAL DISBURSEMENTS	$20,330.06

Section 1920 does not provide for computerized legal

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[3] The attorneys' fees listed here will be deleted from the court's consideration in awarding attorneys' fees in section B of this order.

research,[4] travel expenses, telephone, telecopier, postage, delivery, staff overtime, interlibrary loans, nor miscellaneous requests, so the court denies these amounts. Defendant Shackley, therefore, is entitled to the remaining items totalling $8,402.14.

B. ATTORNEYS' FEES

As stated in the introduction, the court has also decided to award attorneys' fees to the prevailing defendants.[5] The court, therefore, now must determine a reasonable hourly rate for each defendant's attorney and assess the time claimed by the attorneys. Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988). The decision regarding the appropriate hourly rate may be made either by analyzing the affidavits submitted by counsel or, if this documentation is insufficient, by relying upon the court's expertise. Id. at 1304. Likewise, the determination of hours reasonably expended may be based on documentation or, if this evidence is inadequate, the court's own exprience. With these principles in mind, the court will address each defendant's request.

1. ADOLFO CALERO

The law firm that represented defendant Calero has requested fees totalling $57,676.75. Based on an affidavit filed by an attorney not affiliated with the firm, the court

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[4] See also Roberts v. Charter National Life Ins., 112 F.R.D. 411 (S.D. Fla. 1986)

[5] This award is made coextensively pursuant to the "bad faith" exception to the American Rule, see Alyeska Pipeline Service Co., 421 U.S. 240 (1970), 28 U.S.C. § 1927 (1986), and Fed. R. Civ. P. 11.

finds that the rates attributed to the three lawyers are reasonable by comparison in this legal community. Specifically, the rates of $150.00 per hour for an attorney with eight years experience, $200.00 per hour for a lawyer with eighteen years experience, and $85.00 per hour for a newly admitted attorney are reasonable.

In addition to finding the hourly rate reasonable, the court also believes that the time claimed is reasonable. Although the attorneys have not specifically documented the hours expended, the court's experience with this case and similar cases compels the court to find the total award reasonable. The court inferentially finds the hours worked reasonable. Defendant Calero, therefore, is entitled to $57,676.75 in attorney's fees.

2. JOHN HULL

The attorney for John Hull apparently charged the client based on a local rate of $100.00 per hour and an out-of-town rate of $150.00 per hour. The court, in its experience, disallows the differential rates and, consequently, applies the local rate of $100.00 per hour to all of the attorney's entries. The detailed entries reasonably portray the amount of hours expended by the attorney. Based on the uniform rate of $100.00 per hour, defendant Hull is entitled to fees totalling $67,380.00.

3. MOISES NUNEZ RUIZ

Counsel for the defendant filed an affidavit that states he has been admitted to practice in Florida for approximately 13 years and charges $150.00 per hour. The court, again, finds this hourly rate reasonable. Counsel has also clearly identified the services he has rendered for his client. The itemized services bill indicates that counsel spent a

reasonable amount of time on the case, so the court awards attorney's fees in the amount of $4,913.52.

4. ROBERT OWEN

Defendant Owen, represented by a District of Columbia law firm, requests attorneys fees totally $67,509.10. Several attorneys within the law firm represented Mr. Owen, but 94% of the work was performed by an attorney with 13 years of experience, who charged initially $135.00 per hour and ultimately $165.00 per hour. The court finds these rates reasonable based on the attorney's experience and the locale in which he practices. Moreover, the court, after reviewing the time sheets, finds the number of hours expended to be reasonable. Mr. Owen, therefore, is entitled to $67,509.10 in attorneys' fees.

5. RICHARD SECORD

The affidavit submitted by counsel is fairly broad, but based on the documentation and the court's experience, the requested amount for attorneys' fees is reasonable. Specifically, the range of hourly rates was between approximately $75.00 per hour to $190.00 per hour. Moreover, in light of the multiple appearances of counsel and numerous documents filed in this case, the number of hours expended by the law firm is reasonable. The court, consequently, awards attorneys' fees totalling $109,854.00.

The defendant has also requested $16,742.67 for attorneys' fees based on a consultation with another law firm regarding RICO law. The request, however, only states that the fees total $16,742.67. The request does not mention an hourly rate nor hours expended. Despite the court's expertise, it cannot merely guess at an appropriate amount. This request, therefore, is denied.

6. RONALD MARTIN, JAMES McCOY and MARIO DELL AMICO

One law firm represented all three defendants in this litigation. The rates for the attorneys in this case range from $65.00 per hour for associates to $225.00 per hour for a senior partner. The court finds these rates reasonable. With respect to the time billed, the one-inch thick stack of the billing sheets more than adequately details the activities of all of the attorneys involved. The court, therefore, grants the request for fees totalling $79,336.88.[6]

7. RAFAEL QUINTERO, THOMAS CLINES, and ALBERT HAKIM

All three defendants were represented by one law firm. Additionally, Quintero retained separate trial counsel. The documents in the case, including the motion for attorneys' fees, were signed by the law firm representing the three defendants. Consequently, based on the previous filings of the attorneys and their appearances in court, the court can supplement the inadequate affidavit of the firm that represented all three defendants. Moreover, the attached affidavit regarding hours worked and hourly rates is consistent with the court's experience and the other defendants' requests. Conversely, the affidavit submitted by trial counsel for Quintero is insufficient and the court is unfamiliar with counsel because the case did not proceed to trial. The request for fees for trial counsel, consequently, is denied. The court, however, does award Quintero, Hakim and Clines $89,984.40 in attorneys' fees.

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[6] This amount reflects a $640.50 deduction from the defendants' request because of two accidentally placed billing entries.

8. JORGE GONZALEZ

The court is confronted with another insufficient affidavit regarding hours worked and hourly rate. The court, again relying on its experience and expertise, finds the attorneys' hourly rate and hours expended reasonable. Consequently, the request for 283.9 hours at $150.00 per hour totalling $42,585.00 is granted.

9. JOHN SINGLAUB

Singlaub's attorney filed forty-eight pages of billing sheets detailing the tremendous number of hours expended in this case. Moreover, the documentation and accompanying affidavits indicate that the attorneys charged reasonable hourly rates of $100.00 per hour for associates and $175.00 per hour for partners. Combining these hourly rates with the 2062 hours expended in the case, defendant Singlaub is entitled to $297,446.75 in attorneys' fees. Because the court previously awarded $1,200.00 of these fees under Rule 30(g)(2), the amount awarded here is reduced to $296,246.75.[7]

10. THEODORE SHACKLEY

Defendant Shackley hired a Washington, D.C. law firm to represent him in this action. The law firm has complied with every requirement of Norman. Specifically, the attorneys have fully detailed the activities of the lawyers involved in the case and listed the hourly rate of each

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[7] Defendant Singlaub also retained two other lawyers. Unlike the attorneys awarded approximately $300,000.00, these attorneys did not provide the court any basis to determine an appropriate award. Their requests, therefore, are denied.

attorney.[8] Moreover, the fee petition is "well-prepared" because it includes a summary of each attorney's hours and a monthly listing of fees. See Norman, 836 F.2d at 1303. In light of the reasonable hourly rates and reasonable hours expended, the court awards defendant Shackley attorneys' fees totalling $139,844.10.

11. THOMAS POSEY

Defendant Posey, currently representing himself, has filed a motion for attorney's fees with the amount to be determined at a later date. Because the defendant is pro se, the court will allow him until February 24, 1989 to file an itemized description of his previous attorney's hourly rates and hours expended on this case.

Based on the previous discussion, the court

ORDERS and ADJUDGES that the defendants are entitled to the following amounts:

	ATTORNEYS' FEES	COSTS	TOTAL
CALERO	$ 57,676.75	$ 1,427.40	$ 59,104.15
HULL	67,380.00	2,661.45	70,041.45
NUNEZ RUIZ	4,413.52	736.85	5,150.37
OWEN	67,509.10	5,663.90	73,173.00
SECORD	109,854.00	5,208.40	115,062.40
MARTIN, McCOY, DELL AMICO	79,336.88	4,373.85	83,710.73
QUINTERO, CLINES, HAKIM	89,984.40	1,167.00	91,151.40

[8] The attorneys have also attached an affidavit stating that the hourly rates are reasonable in these types of cases.

GONZALEZ	42,585.00	798.30	43,383.30
SINGLAUB	296,246.75	49,061.57	345,308.32
SHACKLEY	139,894.10	8,402.14	148,296.24
TOTAL	$954,880.50	$79,500.86	$1,034,381.36

FURTHER ORDERS and ADJUDGES that defendant Posey has until February 24, 1989 to file the appropriate documentation for determining the amount of attorneys' fees.

Let execution issue.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida this 2nd day of February, 1989.

/s/
JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

[Filed 27 February, 1989]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1146-CIV-KING

TONY AVIRGAN and MARTHA HONEY

Plaintiffs,

v.

JOHN HULL, et. al.,

Defendants.
_____/

ORDER CLARIFYING ORDER
DATED FEBRUARY 2, 1989

Defendants bring a motion to clarify this court's order of February 2, 1989. They seek to determine against whom the fees and costs where [sic] awarded. The plaintiffs have responded by arguing that a procedural bar divests this court's jurisdiction to reconsider this order.

The court finds no merit to the plaintiffs' contentions. They argue that their filing of a notice of appeal immediately divests this court of all jurisdiction over the order that is the subject of the appeal. Aside from the fact that this argument runs contrary to Fed. R. App. P. 12 and established precedent, the record reflects that the notice of appeal was actually filed the same day the motion for clarification was. Accordingly, the notice of appeal could not in fairness to all parties preempt this court's consideration of a motion filed that same day. Accordingly, the court will address the issues

raised in the defendants' motion.

As this court's order dated February 2, 1989 fairly indicates, liability for the costs and fees must rest jointly and severally with Daniel Sheehan, Esq., The Christic Institute, and the plaintiffs, Tony Avirgan and Martha Honey. The court now addressed [sic] the reasons underlying this decision.

As a preliminary matter, the court notes that the plaintiffs are confused over the court's use of the word "coextensively" in its February 2, 1989 order. In footnote 5 of that order, the court indicated that the award was made "coextensively" pursuant to the "bad faith" exception, 28 U.S.C. § 1927, and Fed. R. Civ. P. 11. This language indicates that each of these authorities, separate unto itself, support the entire award. Of course different legal standards govern the award under each authority. The court applied these differing standards and found that the entire award was supported in toto by Fed. R. Civ. P. 11, in toto by 28 U.S.C. § 1927, and in toto by the "bad faith" exception. Essentially, the award mechanism is logical, for an award pursuant to the "bad faith" exception or 28 U.S.C. § 1927 necessarily implies an award under Fed. R. Civ. P. 11 where many of the reasons for the bad faith award center around or relate back to signed pleadings that violated Fed. R. Civ. P. 11.

Daniel Sheehan, Esq. must be liable. He was lead counsel for the plaintiffs. He formulated and put into motion the litigation strategy and tactics that justified the entire award under the bad faith exception and 28 U.S.C. § 1927. He also signed the complaint and affidavit upon which the court justified the entire award under Fed. R. Civ. P. 11. Moreover, as lead counsel, he neglected his continuing obligation under all three authorities to assure that the allegations in the complaint and in the affidavit were borne

out in the discovery process. Mr. Sheehan is liable for the entire amount.

Similarly, The Christic Institute should be liable for the costs and fees. Mr. Sheehan, The Christic Institute's General Counsel, acted on behalf of the Institute. The Institute was the self-pronounced law firm representing the plaintiffs. Its attorneys carried out Mr. Sheehan's litigation strategy, and willingly participated in the litigation tactics. The Institute's name appears on all or most of the plaintiffs' filings. Moreover, because it acted through its officers, the attorneys representing the plaintiffs, the Institute must be held accountable for its agents' neglect of their continuing duty under all three authorities to avoid this frivolous lawsuit. The Christic Institute is liable for the entire award.

For like reasons, the plaintiffs, Tony Avirgan and Martha Honey, should be liable for the entire award. Admittedly, Honey and Avirgan cannot be liable under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927 because they are not attorneys. Nevertheless, they were willful participants in Mr. Sheehan's litigation strategy. The Christic Institute paid them approximately $50,000.00 for consultation, public speaking, and trips from Costa Rica to the United States. See Shackley's motion for sanctions and fees, Exhibit D (Avirgan Deposition at p. 297-302; Honey Deposition at p. 211-13). The plaintiffs, therefore, are liable for the award of costs under the bad faith exception, which is, the entire award.

Because Daniel Sheehan, Esq., The Christic Institute, and the plaintiffs are all liable for the award, they are jointly liable. Moreover, because each contributed to the actions in the defined manners, this liability is also several. Consistent with this opinion, the court

ORDERS and ADJUDGES that the award of fees and costs delineated in this court's order dated February 2, 1989 shall be paid by the plaintiffs Tony Avirgan and Martha Honey, the Christic Institute, and Daniel Sheehan, Esq. jointly and severally.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida this 24th day of February, 1989.

/s/

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

[9 September, 1991]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5720
NO. 89-5143
NO. 89-5232
NO. 89-5515

TONY AVIRGAN and MARTHA HONEY

Plaintiffs,

v.

JOHN HULL, et. al.,

Defendants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING EN BANC
(Opinion June 18, 1991, 11th Cir., 1991, __F.2d__)

Before HATCHETT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no

member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE